UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/595
28 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 595

Case No. 652: SAMPAIO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Francis Spain;

Whereas, on 10 February 1992, Leonor Maria Maia Sampaio, a staff member of the United Nations, filed an application which read, in part, as follows:

"II - Pleas

...

(b) The decision which the Applicant is contesting is the denial by the Secretary-General of the reimbursement in the correct amount due to her of medical expenses covered under the Staff Mutual Insurance Society Against Sickness (hereinafter referred to as the Society), pursuant to article VI 2 of the Staff Regulations for Staff posted or serving at Geneva.

(c) The obligation which the Applicant is invoking and whose specific performance she is requesting under article ... of the Statute of the Tribunal is the obligation to reimburse the staff member in the amounts due in accordance with (b) above at a rate of exchange established on the basis of the principles laid down by the Tribunal in Judgement No. 234, Johnson vs. the Secretary-General and in compliance with UN Financial and Accounting Instruction No. 31, Rev. 1.

The method sanctioned by the Respondent in this case is, moreover, a violation of the general principle prohibiting the Secretary-General from applying discriminatory principles and practices to different staff members or groups thereof in matters of their compensation, including the reimbursement for expenses to which they are entitled.

(d) The amount of compensation sought is 9.012.00 Swiss francs, representing the difference between the amount she received as reimbursement, calculated at the rate of exchange prevailing on the date of payment and that applicable on the dates when she incurred the expenditures. This amount should be augmented by interest at the prevailing rate, during the period of delay."

Whereas the Respondent filed his answer on 4 May 1992;

Whereas the facts in the case are as follows:

The Applicant, a national of Brazil, entered the service of the United Nations in New York, on 28 January 1970, on a fixed-term appointment as an Associate Librarian at the P-2 level. The Applicant's appointment became permanent with effect from 1 April 1974. The Applicant was transferred to the United Nations Office at Geneva (UNOG) on 1 January 1972. In May 1980, the Applicant was reassigned to Headquarters. With effect from 14 January 1989, she was reassigned to UNOG. On 1 July 1990, the Applicant was transferred to UN Headquarters.

During her assignment in Geneva, the Applicant was a member of the Geneva United Nations Staff Mutual Insurance Society Against Sickness and Accident (the Society), established under staff regulation 6.2 "to reimburse, within the limits laid down in the Society's Internal Rules, the expenses incurred by its members arising from sickness, accident or maternity". During 1989, the Applicant went to Brazil on home leave and incurred certain medical expenses in respect of herself and her daughter. The Applicant filed claims with the Society for reimbursement of the medical expenses incurred. The total amount of the claim was Brazilian cruzados 35046.47. On 21 February 1990, the Society reimbursed the

Applicant, converting Brazilian cruzados into Swiss francs, using the official UN rate of exchange prevailing on that date, as provided in annex II, article 2 (a)(vii) of the Society's Statute and Internal Rules.

On 27 March 1990, the Applicant wrote to the Society, contesting this method of conversion. She claimed that failure to use the correct method, i.e. conversion at the official UN rate of exchange prevailing on the date of expenditure, had resulted in a loss to her of approximately Swiss francs 9,012. She requested that the exchange rate prevailing on the date of expenditure be applied to her claim for reimbursement.

Under the provisions of annex II, article I of the Society's Internal Rules, claims are submitted to UNOG's Finance Service for examination and payment. Accordingly, on 10 April 1990, the Officer-in-Charge of UNOG Finance Service, Payment Section, informed the Applicant that the computation had been made in accordance with annex II, article 2 (a)(vii) of the Statute and Internal Rules of the Society which provided for the application of the UN official rate of exchange on the date of reimbursement (i.e., 21 February 1990).

Further correspondence ensued between the Applicant and the Society. On 24 August 1990, the Applicant requested the Secretary-General to review the Society's decision. Not having received a substantive reply, on 16 November 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 22 May 1991. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 28. In view of the Panel's unanimous finding that relevant procedures were breached in the course of reaching the contested decision, it concluded that recommendation for redress would be appropriate.
>
> 29. While noting that the appellant had requested the JAB to recommend that the rate of exchange prevailing on the date she incurred the expenses be

used in determining the amount of her reimbursement and the Respondent's contention that it was 'not for the Joint Appeals Board whose competence is limited by staff regulation 11.1 to appeals by staff members against administrative decisions alleging the non-observance of their terms of appointment to recommend that an exception be made to a valid rule' the Panel recalled that since the Society and its rules were established under staff regulation 6.2 for the benefit of United Nations staff members serving at Geneva and since it was competent to receive appeals with regard to the non-observance of the Staff Regulations and Rules and any rules made thereunder, it was equally competent not only to decide the question of the non-observance of the rules of the Society, but also in view of its finding that there had been a breach of the relevant procedure, to examine whether or not to recommend that an exception be made to the application of the relevant rule of the Society.

30. Having noted that the real reason the appellant contested the application of the relevant rule of the Society to the refund of her medical claim was that it would cause her financial loss and also having noted the Respondent's acceptance that the application of the relevant rule of the Society to individual cases results in the reimbursement of a greater or lesser amount than would be the case if the date of expenditure was used, and that using the rate of exchange prevailing on the date of expenditure would be favourable to the appellant, the Panel concluded that this was a case in which an exception should have been considered by the Society. Nothing prevented the Society from considering such an exception at any time during these activities and proceedings. The Society, however, did not do so, and persisted in not doing so, despite the appellant's numerous applications to the Society for use of a different exchange rate, her request to the Secretary-General for administrative review and her appeal to the JAB. Accordingly, in order to give equitable relief: equity assumes that which should be done, is done, the Panel itself has considered an exception to the relevant rule of the Society, and found that it would be appropriate to grant one.

31. Accordingly, the Panel <u>recommends</u> that as an exception, the appellant's refund should be calculated using the rate of exchange prevailing on the date of expenditure."

On 27 June 1991, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the Board's report and stated:

> "Bearing in mind the following conditions:
>
> (a) that you, as a member of the Society, had accepted its Statute;
>
> (b) that the Statute establishes Internal Rules to govern the administration of the Society and Annex II to those Internal Rules establishes the refund procedure, which incorporates an appeals procedure;
>
> (c) that you did not receive the benefit of the appeals procedure provided in the Internal Rules on the question at issue, i.e. whether an exception ought to be made to Internal Rule 2(vii) of Annex II;
>
> the Secretary-General has decided to remand this question to the Society for consideration by its Executive Committee in accordance with its Internal Rules."

On the same date, the Officer-in-Charge of the Department of Administration and Management wrote to the Executive Secretary, Executive Committee of the Society, informing him of the Secretary-General's decision on the JAB report and asking to be informed of the outcome of the Committee's consideration of whether an exception ought to be made in respect of the Applicant's claim for reimbursement.

On 2 December 1991, the Director, Office of the Under-Secretary-General for Administration and Management informed the Applicant as follows:

> "Further to [the Officer-in-Charge of the Department of Administration and Management's] letter to you of 27 June 1991, this is to advise that the Executive Committee of the Society has reviewed your case, as had been requested in the interest of good administration. It has decided to maintain its decision since no exceptions have been made in the past and exceptions would make orderly administration of the Fund difficult. Copy of the cable of

14 November 1991, from the Executive Secretary of the Society advising of this decision is attached.

At the same time, the Secretary-General has considered the Board's report and its recommendation. He has concluded that the Board had no jurisdiction to hear your appeal since the Society has a set of Statutes and Internal Rules agreed to by all the members, including an appeals procedure. Accordingly, he has decided to reject the Board's recommendation.

The exceptional delay in dealing with the recommendation of the Joint Appeals Board in this matter was caused by the need to conduct several rounds of consultation, and is regretted."

On 10 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent wrongfully denied her the correct amount of reimbursement in respect of her claim for medical expenses by wrongly applying the rate of exchange prevailing on the date of payment, instead of the date of expenditure.

2. The Respondent's action was discriminatory and a violation of UN Financial and Accounting Instruction No. 32, Rev.1, as well as of the Tribunal's established jurisprudence.

3. The Applicant suffered losses as a consequence of the Respondent's action.

Whereas the Respondent's principal contentions are:

1. The Applicant's medical expenses were correctly reimbursed by the Society in accordance with its Internal Rules.

2. Although the Respondent's handling of the Applicant's appeal under the Society's procedures was flawed, that flaw was rectified and the Applicant was afforded her full appeal rights.

The Tribunal, having deliberated from 4 June to 28 June 1993, now pronounces the following judgement:

I. The Applicant, while a member of the Staff Mutual Insurance Society Against Sickness (hereinafter referred to as "the Society"), during her assignment to Geneva, incurred various medical expenses during her home leave in Brazil, for which she was entitled to reimbursement by the Society.

II. According to article 2(a)(vii) of annex II of the Internal Rules of the Society, its members are entitled to reimbursement of their medical expenditures only in Swiss francs. As the expenses had been paid by the Applicant in Brazilian currency, it became necessary to convert the amount paid by the Applicant in Brazil into Swiss Francs.

The way this conversion was calculated constitutes the sole issue to be determined by the Tribunal in this case, since neither the validity of the claim for reimbursement nor its amount in Brazilian currency have been questioned.

III. The controversy arises from the fact that the Brazilian currency suffered an extremely sharp devaluation from the time when the medical expenses were paid in Brazil until the time when the Society reimbursed the Applicant. This devaluation, according to figures provided by the Applicant to the Joint Appeals Board (JAB) and not contested by the Respondent, showed that the exchange rate of the U.S. dollar in October 1989, was 4.35 cruzados per dollar when the Applicant paid her medical expenses in Brazil and it rose to 21.20 cruzados per dollar in February 1990, with a corresponding effect on the exchange rate between the Swiss Franc and the Brazilian cruzado, when the Society reimbursed the Applicant.

IV. The Society accepted the Applicant's claim for reimbursement, but calculated the conversion from Brazilian currency to Swiss Francs according to the exchange rate prevailing at the time of refund. The Applicant disagreed with the exchange rate used for the conversion and claimed that she was entitled to reimbursement

at the rate of exchange in effect on the date of payment of her medical bills in Brazil.

V. The Society refused to accept the Applicant's view on the ground that paragraph (2)(a)(vii) of annex II of its Internal Rules clearly specifies that "expenditure in foreign currency shall be refunded at the official United Nations rate of exchange in force at the date of refund".

The Applicant requested the Secretary-General to review the Society's decision and not having received a reply, filed her appeal before the JAB. The JAB found that the proper procedure had not been observed and recommended that an exception be made to the rule invoked by the Society to refuse the Applicant's request. The Secretary-General transmitted the JAB report to the Applicant and informed her that he had "decided to remand this question to the Society for consideration by its Executive Committee in accordance with its Internal Rules." The Society reconsidered its decision but refused to make an exception in favour of the Applicant.

The Respondent, on receipt of this refusal, decided to reject the JAB report on the ground that it had no jurisdiction in the case, since the Society had its own appeals procedure. At the same time, the Tribunal notes that a congratulatory letter was sent to the JAB for its work on the case. In spite of the Respondent's decision regarding the JAB's lack of competence, he did not raise this question of competence before the Tribunal.

The Tribunal, however, wishes to address the question, in order to dispel any doubt as to its own competence to decide this case.

VI. The first issue to be considered by the Tribunal is whether the existence of an appeals procedure established by the Statute and Rules of the Society precludes the possibility of the Applicant resorting to the recourse procedure against administrative decisions established by the Respondent under Chapter XI of the Staff Rules and Regulations.

In the Tribunal's view, the Society, in spite of being a sui generis organization, cannot be regarded as being independent of the United Nations, inasmuch as it has been established by the Secretary-General, in accordance with article 6.2 of the United Nations Staff Regulations. In addition, its Statute and Internal Rules are subject to the approval of United Nations officials and its head, the Executive Secretary, is appointed by the Director-General of the United Nations Office in Geneva.

VII. As a consequence, the Tribunal concludes that the United Nations Staff Rules and Regulations are applicable to the Society and that the establishment by the Society of an internal recourse procedure does not abrogate the right of any of its members to resort to the appeals procedure provided by the United Nations Staff Rules and Regulations. This is all the more so, since the internal appeals procedure of the Society only provides for review by its Executive Committee, a body entirely composed of members appointed by the Administration. To refuse members of the Society any further recourse, in particular, to refuse them the possibility of going before a body in which the staff is represented, such as the JAB and ultimately before the Administrative Tribunal, an independent judicial organ, would be tantamount to depriving the staff of essential rights.

VIII. The Tribunal will now examine the merits of the Applicant's claim. The Tribunal notes, in the first place, that, according to staff regulation 6.2, "The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave and maternity leave, ...". It was to ensure that these rights of the staff are safeguarded that the Secretary-General established the Society. Consequently, the Society cannot, in any circumstance, adopt a decision or introduce a rule that has the effect of thwarting the fundamental purpose for which it was created. If such a decision is taken or such a rule is adopted by the Society, it infringes the staff member's rights

under staff regulation 6.2. In addition, paragraph 2(a)(vii) of annex II of the Society's Internal Rules contains an aspect of arbitrariness. By fixing the date for conversion to Swiss Francs at the date of payment by the Society, rather than a proven date of payment of the medical expenses by the staff member, the Tribunal finds, as indeed has been admitted by the Respondent, that the Society, in effect, requires the staff member to chance the fortuity of upward, downward or no movement in the exchange rate. Although the Tribunal recognizes that this may be administratively convenient for the Society, that does not justify imposing such a risk on the staff member in the context of reimbursement of expenses under a health protection system.

IX. The Tribunal holds that, because of the deficiencies noted above, the application of paragraph (2)(a)(vii) of annex II of the Society's Internal Rules in this case, has prevented the Applicant from recovering expenses incurred for health protection to which she was entitled.

X. The Tribunal considers it legitimate to conclude that the meteoric fall (between 400 and 500%) in the exchange rate of the Brazilian cruzado, (in relation to the Swiss Franc), in a very short period, could not be foreseen when the Society established its Statute and Rules. Further, the Tribunal is of the view that it was to meet these remarkably unusual developments that a request for making exceptions in the application of the relevant rule was made, irrespective of the fact that the Applicant had accepted implicitly the Society's Statute and the Rules made thereunder. However, the Society declined to make any exception, despite the recommendation of the JAB, endorsed by the Respondent, on the ground that no exception had ever been made and that exceptions could create complications in the administration of the Society's funds. Without commenting on these grounds for rejection, the Tribunal finds that as a consequence, the Applicant has been denied her rights.

XI. Thus, the Administration, as a result of decisions taken by officials of the Society - appointed by the Administration - and of the enforcement of rules approved by the Administration, failed to protect the Applicant's rights to health coverage as recognized in staff regulation 6.2. Accordingly, the Tribunal finds that the Administration should be held responsible for such failure.

XII. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant the amount, in Swiss Francs, that the Applicant should have received from the Society, at the rate of exchange prevailing at the time she paid her medical expenses in Brazil, less the amount she has already received from the Society, in order to cover completely the expenses she incurred. This sum should be payable with 8% interest, from February 1990, until the date of payment.

(Signatures)

Samar SEN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

Francis SPAIN
Member

Geneva, 28 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary